WP(C) 8471/2005
BEFORE
HON'BLE JUSTICE B.K. SHARMA

JUDGEMENT AND ORDER

1. The petitioners are the aspirants for promotion to the post of Sub-Divisional Agricultural Officer (SDAO). Their grievance is that the respondents have violated the provisions of the relevant service rules in initiating process to promote the officers in the feder grades. Accordingly, the prayer made in this writ petition is for issuance of a direction to the respondents to follow the provisions of the rules.

2. The petitioners were initially appointed as Agricultural Extension Officer (AEO) which has now been redesignated as Agricultural Development Officer (ADO). After continuing as such for a considerable length of time, the petitioners were posted as Junior Subject Matter Specialist (JSMS) which has now been redesignated as Senor Agricultural Development Officer (SADO). Such posting of the petitioners was by way of transfer from the cadre of AEO/ADO to JSMS/SADO and the same was done on the basis of the seniority in the cadre of AEO/ADO. According to the petitioners the post of JSMS/SADO is of higher rank and status carrying special pay and it is under supervision of such JSMS/SADO, the AEO/ADOs perform their duties. Be it stated here that the petitioners were transferred and posted as JSMS/SADO in the year 1988 (29.11.88).

3. According to the petitioners, the total cadre strength of the next promotional post of SDAO on the basis of Annexure-B seniority list is 63. By Annexure-C notification dated 22.01.02, the Govt. conveyed the sanction of upgradation of 100 posts of JSMS to that of SDAO indicating that such upgradation would come into force w.e.f. the date of entertainment of the upgraded posts. It was also indicated that consequent upon upgradation of 100 posts of JSMS to that of SDAO, there would be corresponding abolition of 100 posts of JSMS from the date of entertainment of upgraded posts.

4. The promotion to the post of SDAO is made under Assam Agricultural Service Rules, 1980. The petitioners have stated that in Annexure-D seniority list of SDAO, the total cadre strength has been shown as 69 with only 59 serving incumbents. In Annexure-E seniority list of JSMS dated 23.05.02, the names of the petitioners appeared at serial Nos. 111, 117, 119 and 123 respectively out of total No. 209 JSMS. A separate seniority list of AEOs as on 10.07.02 was also published containing the names of 543 AEOs. According to the petitioners, their present positions in the seniority list are 102, 107, 109 and 113 respectively due to retirement/death of some of the incumbents above them. By Annexure- F order dated 30.12.02, altogether 47 SDAOs were promoted to the next higher rank, as a consequence of which 47 vacancies of SDAO fell vacant.

5. This court during the course of hearing of the case requested the learned State counsel to furnish exact position relating to total cadre strength of SDAO prior to creation of aforesaid 100 posts and their percentage of reservation achieved while promoting the aforesaid 47 officers in 2002 (30.12.02).

6. In response to the aforesaid queries put on record by order dated 24.07.07, the Govt. by its letter dated 30.07.07 addressed to the learned State counsel has indicated that the total cadre strength of existing SDAO is 65. As regards the percentage reservation achieved, it has been stated as per the Roster Register maintained in the department, percentage of reservation has been worked out against 289 number of posts (vacancies).

7. On the basis of the aforesaid instructions this proceeding is confined

to 65 normal promotional vacancies and 100 upgraded vacancies of SDAO.

8. The JSMS had earlier filed a writ petition being W.P.(C) No. 1043/03 in which a claim was made that since they have been transferred and posted as JSMS from the cadre of AEO with special pay, they are holders of higher post than th e AEO and thus their case for promotion to the next higher grade of SDAO should be considered independent of consideration of the case of the AEO. On the other hand, the AEOs also filed a writ petition being W.P.(C) No. 2195/03 claiming tha t they are at per with the JSMS and are entitled to get promotion to the next hi gher grade of SDAO.

9. The first writ petition being W.P.(C) No. 1043/03 was allowed while the second writ petition being W.P.(C) No. 2195/03 was dismissed. The matter was car ried on appeal by way of WA No. 348/04 and 349/04. The Division Bench set aside the judgment passed in the writ petitions and allowed the writ appeals. Conseque ntly, the first writ petition stood dismissed while the second writ petition sto od allowed. Operative part of the judgment in writ appeal is quoted below:

17. & This observation of the Hon'ble Supreme Court further clarify the posi tion that when a Statute as it is admit of no ambiguity, question of looking int o the past practice would not arise as this would upset the provisions of the St atue. The case at hand is somewhat akin to this situation. The rules provides fo r two independent cadres without any provision for inchangeability, and these tw o cadres are the feeder cadres to the post of Sub-Divisional Agricultural Office rs. This alone rules out any scope for interpretation of the provisions of the s ervice Rules with the aid of past practice. Though the JSMS only have been cons idered for promotion to the post of Sub-Divisional Agricultural Officer so far, such practice cannot be superimposed on the provisions of the Rules. The right v ested on the incumbents to the cadre of AEOs under the Rules cannot be obliterat ed altogether. If the impugned interpretation is sustained, the AEOs will be lef t at lurch in perpetuity without any avenue for promotion. The argument that th e Senior AEOs will be transferred to the cadre of JSMS batch by batch and then c onsidered and promoted to the posts of Sub Divisional Agricultural Officer canno t salvage the situation. It is because the AEOs do not have any vested right of transfer to the cadre of JSMS under the Rules. They may or may not be transferre d by the State. We are, therefore, constrained to hold that the JSMS have failed in their bid to make out a case for themselves to the exclusion of the AEOs.

18. In the result, both the appeals are allowed. Consequent thereupon, Writ pet ition (C) No. 1043 of 2003 filed by the JSMS is dismissed and the Writ Petition (C) No. 2425 of 2003 filed by the AEO is allowed in reversal of the impugned com mon judgment. It is directed that the upgraded 100 posts in the cadre of Sub-Div isional Agricultural Officers have to be filed up from the incumbents of both th e cadres of JSMS and AEOs in accordance with the provisions of the Rules. For th is purpose a ratio in the cadre of Sub-Divisional Agricultural Officer may be pr escribed by the State. The incumbents to the Cadre of JSMS who are holding the p osts on transfer are also declared eligible for consideration for promotion on t he basis of their rank, status and seniority as AEOs.

10. From the aforesaid adjudication of the matter between the AEOs and the JSMS, what has emerged is that the promotional post of SDAO are now to be filled up from amongst the incumbents of both the cadres of JSMS and AEOs in accordanc e with the provisions of the rules.

11. As regards the upgraded 100 posts in the cadre of SDAO, they are to be f illed up from both the cadres of JSMS and AEO in accordance with the provisions of the rules. However, for the purpose, the ratio in the cadre of SDAO is to be prescribed by the Govt.

12. Rule 13 of the Assam Agricultural Rules, 1980 makes the provision for ho

lding of year wise selection for promotion. Upon a reference to Rule 3, 4, 11, 12 and 13 of the Rules, it is the case of the petitioners that there are two distinct and separate cadres of AEOs and JSMS, although incumbents of the both cadres are eligible for promotion to the post of SDAO. Further case of the petitioners is that in case of non-holding of yearly selection, it is incumbent on the part of the official respondents to prepare year wise penal on the basis of the year wise vacancies. In paragraph 13 of the writ petition, the petitioners have indicated the number of vacancies arose in different years. They are shown below :

Sl. No.	Period	Vacancies	Reasons for vacancy
1)	Prior to October, 2001	5	by retirement/death
2)	November, 2001	2	by death/retirement
3)	01.01.02 to 31.12.02	8	by death/retirement
4)	December, 2002	47	by promotion
	Total	62	

13. With the aforesaid position, the next plea of the petitioners is relating to adherence to 20 point Roster relating to reservation. In paragraph 15 of the writ petition, the petitioners have stated that as per opinion rendered by the Legal Remembrancer of the State, the normal vacancies and the upgraded vacancies are to be clubbed together applying the ratio in 3:2 for AEO and JSMS and also applying the formula relating to clearance of backlogs taking the normal and upgraded vacancies together. It has been stated by the petitioners that as per the said opinion of the Legal Remembrancer, the respondents have proceeded with the matter in that manner which according to them is contrary to the aforesaid direction of the Division Bench as well as the rules holding the field. Further case of the petitioner is that if the opinion rendered by the Legal Remembrancer is to be accepted, same will lead to violation of the provision of the Assam Schedule Castes and Schedule Tribes (Reservation of Vacancies in Service and Posts), Act 1978 and the Rules framed therein.

14. Referring to Annexure- I and J office memoranda dated 28.08.01 and 14.07.04 respectively, the petitioners have asserted that once the percentage of reservation is achieved, there is no question of falling back on backlogs. According to the petitioners, the respondents have committed mistake in calculating the percentage of reservation and applying the test of clearance of backlogs. Further case of the petitioners is that if the procedure adopted by the respondents is allowed to stand, same will lead to excessive reservation. Showing the total cadre of strength to be 62 (normal) and 100 (upgraded) and applying the ratio of 1:4, the petitioners have contended that if altogether 648 incumbents which would naturally include AEOs as well, are considered for promotion to 162 posts, then leaving aside the total cadre strength of 267 JSMS, 381 AEOs will also come in to the zone of consideration. In that case huge number of reserved category candidates would score a march over the petitioners. Further case of the petitioners is that there is no question of applying the test of backlog in the newly created 100 posts.

15. The official as well as the private respondents have filed their counter affidavit denying the contentions raised in the writ petition. According to them, when it has been held by the Division Bench that the incumbents in both the cadres, i.e. AEO and JSMS, although two separate cadres, are entitled to get consideration for promotion as per the aforesaid service rules, there is nothing wrong in considering the incumbents of both the cadres for promotion to the cadre of SDAO. According to them both normal as well as the upgraded promotional vacancies are to be clubbed together for consideration of the case of the incumbents in both the cadres.

16. The respondents have also supported the test of reservation policy sought to be applied. In paragraph 37 of the affidavit in opposition filed by the respondents No. 4 to 8, it has been stated that 7 promotional vacancies of SDAO arose in 2001 and 55 vacancies arose in the year 2002. According to them, 100 upgraded vacancies also arose in 2002. Thus, according to them, for 162 vacancies of SDAO, a combined selection is to be made.

17. The official respondents in their affidavit have stated that 7 vacancies which arose prior to 2002, were also taken into account along with 55 vacancies occurred in 2002. It has also been stated that a selection was conducted on 15.02.02 taking together all 162 posts (normal and upgraded). According to them, clubbing of 7 vacancies occurred prior in point of time along with 55 vacancies did not lead to any major loss and gain to either of the parties. In paragraph 13 of the affidavit filed by the official respondents, it has been stated that reservation roster has been maintained in the department w.e.f. 01.05.79 and as per the said register the department has already filled up 289 vacancies in the cadre of SDAO as per the respective roster points for reserved categories. It is the specific stand of the official respondents that 100 upgraded posts are also promotional posts in the rank of SDAO, so in case of filing up the same, clear procedure of selection as per existing rules, including the backlog etc. will have to be followed. In paragraph 17 of the said affidavit, it has been stated that the department has followed the provision of the Assam Schedule Castes and Schedule Tribes (Reservation of Vacancies in Service and Posts) Act, 1978 without exceeding the required percentage of reserved categories.

18. I have heard Mr. D.K. Mishra, learned Sr. counsel assisted by Mr. B. Chokraborty, learned counsel for the petitioners as well as Mr. N. Dutta, learned Sr. counsel assisted by Mr. A.N. Choudhury and Mr. P. Deka, learned counsel for the private respondents. I have also heard Ms. R. Chokraborty and Mr. B.J. Talukdar, learned State counsel representing the official respondents. I have also gone through the materials on record.

19. From the respective pleadings and arguments of the parties, the following questions/issues have arisen for determination.

a) Whether in terms of Rule 13 of the Rules, year wise penal for filling up the promotional vacancies of SDAO are required to be prepared

b) Whether 100 upgraded posts of SDAO are to be clubbed along with normal 65 vacancies.

c) Whether there is excessive reservation by way of exceeding the permissible limit of 50%.

d) Whether in the name of filling up of the backlog vacancies, the prescribed percentage of reservation can be exceeded.

e) Whether carry forward formula relating to backlog vacancies will be applicable to newly created 100 posts.

20. Issue No. (a): Rule 13 of the Assam Agricultural Service Rules 1980 lays down the general procedure of promotion as per which in case of availability of vacancies, an obligation is cast on the Govt. to take steps for holding the selection every year. As per the statement made in paragraph-10 of the affidavit filed by the official respondents, out of 62 normal vacancies, 7 vacancies occurred prior to 2002, while 55 vacancies occurred in the year 2002. However, it is their stand that such 55 vacancies will have to be taken into account along with 100 vacancies purportedly created in the year 2002 by Annexure-C order dated 22.01.02.

21. If the preparation of year wise penal is the requirement of Rule 13, then in that case, a composite selection cannot be held for the aforesaid 7 (2001) + 55 (2002) vacancies. As per the requirement of Rule 13, the selection committee should be commenced on regular annual intervals to draw penal which could be

utilized for making promotion against the vacancies occurred during the course of a year. Rule 13 lays down the detailed procedure in this regard.

22. Very often the selection meeting is initiated after a vacancy has arisen. This results in undue delay in filling up the vacancies causing dissatisfaction among those who are eligible for promotion. It is always desirable rather mandatory that regular meetings of selection committee are held every year for each category of posts so that an approved select penal is available in advance in making promotion against the vacancies arisen every year. However, for the reasons beyond the control of the selection committee the selection cannot be held in a year(s), even though vacancies arose during that year(s), in the normal circumstance, the selection committee is to prepare year wise penal by placing the select list of earlier year above the one for the next year and so on. This aspect of the matter has been discussed in the decision of the Apex Court reported in (1995) 4 SCC 246 (Vinod Kumar Sangal vs. Union of India and others) and (1997) 9 SCC 287 (Union of India vs. N.R. Banerjee)

23. Applying the above test, the respondents cannot club the aforesaid 7 + 55 vacancies in a single selection and since the respondents have accepted the particular plea relating to preparation of year wise penal, they will have to prepare separate select list for 55 posts preceded by the select list for 7 pots which according to the respondents have occurred in 2002 and 2001 respectively.

24. Issue No. (b): By Annexure (C) letter dated 22.01.02, the Govt. of Assam in the Agricultural Department intimated the Accountant General (A & E), Assam relating to upgradation of 100 posts in the rank of JSMS to SDAO. Such upgradation is not automatic, but will be effective from the date of entertainment of upgradation of the posts which again is dependent on simultaneous abolition of 100 posts of JSMS. Rule 13 of the Rules mandates preparation of yearly penal on the basis of the likely number of vacancies to be filled up by promotion in the next year. Before the end of each year, the Govt. is to make assessment of the likely number of vacancies. Such assessment could be made only against normal vacancies and not against the contemplated upgraded vacancies as notified by Annexure-C dated 22.01.02. Further 100 vacancies were not in existence in the year 2002. The vacancy would arise only upon abolition of 100 posts of JSMS with simultaneous promotion of the incumbents to the promotional post of SDAO. In this connection, the language applied in Annexure-C letter dated 22.01.02 has a significant bearing. In the letter it has been indicated that upgradation will come into force w.e.f. the date of entertainment of upgraded posts. Thus, until and unless the upgraded posts are entertained with simultaneous abolition of 100 posts of JSMS, it cannot be said that those 100 posts were in existence in 2002. Even otherwise also there could not have been any visualization of those 100 pots in the preceding year in which the assessment of likely number of vacancies was to be made.

25. In view of the above, I am of the considered opinion that 100 upgraded posts which are yet to come into existence should be excluded from the purview of 65 normal vacancies. Although there is no definite indication in this regard in the Division Bench judgment in the aforesaid writ appeals, but inference can be drawn from the operative part of the judgment extracted above.

26. The Division Bench while holding that 67 normal vacancies of SDAOs are to be filled up from amongst AEO and JSMS, has also held that for the upgraded 100 posts the incumbents of both the categories are entitled to get promotion in accordance with the provisions of the aforesaid Rules. However, the Govt. has been left to provide ratio for the purpose. If any ratio is to be provided for 100 upgraded posts, the said posts cannot be clubbed along with 65 normal vacancies. Be it stated here that the recruitment rules itself do not provide for any such ratio.

27. Issue No. (c): As has been held in R.K. Sabharwal vs. State of Punjab reported in (1995) 2 SCC 745, the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of vacancy has no relevance in operating the percentage of reservation. By now it is well accepted principle of reservation that the reservation cannot exceed the ceiling limit of 50%. The Govt. has to apply the cadre strength as a unit in the operation of Roster in order to ascertain whether a given class/group is adequately represented in service. The cadre strength as a unit also ensures that the upper ceiling limit of 50% is not violated. Further the Roster is to be post specific and not vacancy based.

28. In R.K. Sabharwal (supra), the Apex Court vividly dealt with problematic areas relating to percentage of reservation, operation of Roster and the expression post and vacancy thus:-

4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class. Have been appointed/promoted against general seats in the State Services may be relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same.

5. We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each Department. The roster is implemented in the form of running account from year to year. The purpose of running account is to make sure that the Scheduled Cases/Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of running account in the impugned instructions has to be so interpreted that it does not result in excessive reservation. 16% of the posts &. are reserved for members of the Scheduled Castes and Backward Classes. In a lot of 100 posts those falling at Serial No. 1, 7, 15, 22, 30, 37, 44, 51, 58, 65, 72, 80, 87 and 91 have been reserved and earmarked in the roster for the Sch

eduled Castes. Roster points 26 and 76 are reserved for the members of the Backw ard Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the S cheduled Castes. To illustrate, first post in a cadre must go to the Scheduled C aste and thereafter the said class is entitled to 7th, 15th, 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the opera tion of the roster then the result envisaged by the impugned instructions is ach ieved. In other words, in a cadre of 100 posts when the posts earmarked in the r oster for the Scheduled Castes and the Backward Classes are filled the percentag e of reservation provided for the reserved categories is achieved. We see no ju stification to operate the roster thereafter. The running account is to operat e only till the quota provided under the impugned instructions is reached and no t thereafter. Once the prescribed percentage of posts is filled the numerical te st of adequacy is satisfied and thereafter the roster does not survive. The perc entage of reservation is the desired representation of the Backward Classes in t he State Services and is consistent with the demographic estimate based on the p roportion worked out in relation to their population. The numerical quota of pos ts is not a shifting boundary but represents a figure with due application of mi nd. Therefore, the only way to assure equality of opportunity to the Backward Cl asses and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the rost er. The operation of the roster and the running account must come to an end th ereafter. The vacancies arising in the cadre, after the intial posts are filed, will pose no difficulty. As and when there is a vacancy whether permanent or tem porary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste person s holding the posts at roster points 1, 7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, i f the persons holding the post at points 8 to 14 or 23 to 29 retire then these s lots are to be filled from amongst the general category. By following this proce dure there shall neither be shortfall nor excess in the percentage of reservatio n.

6. The expressions ’posts’ and ’vacancies’, often used in the executive ins tructions providing for reservations, are rather problematical. The order ’post’ means an appointment, job, office or employment. A position to which a person i s appointed. Vacancy means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a ’post’ in existence to en able the ’vacancy’ to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of r eservation has to be worked out in relation to the number of posts which form th e cadre-strength. The concept of ’vacancy’ has no relevance in operating the per centage of reservation.

7. When all the roster pints in a cadre are filled the required percentage of reservation is achieved. Once the total cadre has full representation of the Scheduled Castes/Tribes and Backward Classes in accordance with the reservation policy then the vacancies arising thereafter in the cadre are to be filled from amongst the category of persons to whom the respective vacancies belong.

10. We may examine the likely result if the roster is permitted to operate i n respect of the vacancies arising after the total posts in a cadre are filled. In a 100 point roster, 14 posts at various roster points are filled from amongs t the Scheduled Caste/Scheduled Tribe candidates, 2 posts are filled from amongs t the Backward Classes and the remaining 84 posts are filled from amongst the ge neral category. Suppose all the posts in a cadre consisting of 100 posts are fil led in accordance with the roster by 31.12.94. Thereafter in the year 1995, 25 g eneral category persons (out of the 84) retire. Again in the year 1996, 25 more persons beloging to the general category retire. The position which would emerge

would be that the Scheduled Castes and Backward Classes would claim 16% share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary, if the roster is permitted to operative till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose retirement etc. cause the vacancies then the balance between the reserve category and the general shall always be maintained. We make it clear that in the event of non-availability of a reserve candidate at the roster point it would be open to the State Government to carry forward the point in a just and fair manner.

29. According to the petitioner taking into account 62 normal vacancies and 100 upgraded posts of SDAO, the permissible limit of reservation is as follows:

S.C.	7%	11.34 say 11 posts
ST (Plain)	10%	16.20 say 16 posts
ST (Hills)	5%	8.1 say 8 posts
	22%	35 posts

30. However, according to the Govt. as reflected in its counter affidavit, the Roster Register has been maintained w.e.f. 01.05.79 in the department. In paragraph-13 of the affidavit, it has been stated that the department has already filled in 289 vacancies in the cadre of SDAO showing the respective roster points for reserved categories. From this statement coupled with the written instruction furnished to the State Govt. by the Agricultural Department by its letter dated 25.05.07, while admitting that total percentage of reservation is 22%, but the same has been shown to be operative against 289 vacancies taking into account the vacancy position since 1979.

31. By showing the aforesaid 289 vacancies from 1979, the respondents have calculated the reserved category percentage as follows:

ST (Plain)	10%	29
SC	7%	20
ST (Hills)	5%	14

32. On the basis of the above calculation, the respondents have shown the backlog vacancies as 35 with the following back up:

Post	Reserved	Officer promoted	Backlog From reserved category
ST (P)	29	18	11
SC	20	7	12
ST (H)	14	2	12
Total	63	28	35

33. According to the respondents, 50% ceiling limit is not applicable in case of backlog vacancies as the same are not within the purview of 50% limit. They have shown calculation relating to percentage of reservation and backlog against 162 vacancies as follow:

Category	Backlog	Current Total

ST (P)	11	17		28
SC	12	12		24
ST (H)	12	8		20
Total	35	37		72

34. From the aforesaid position what has emerged is that the respondents have applied the percentage of reservation against the vacancies and not against the posts which is clearly impermissible as per law laid down by the Apex Court in R.K.Sabharwal's case.

35. The Apex Court in the case of M. Nagaraj vs. Union of India reported in (2006) 8 SCC 212 observed thus:

82. Before dealing with the scope of the constitutional amendments we need to recap the judgments in Indra Sawhney and R.K. Sabharwal. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in R.K. Sabharwal this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota limit has been reached. It was clarified that the judgment in Indra Sawhney was confined to initial appointments and not to promotions. The operation of the roster for filing the cadre strength, by itself, ensures that the reservation remains within the ceiling limit of 50%.

83. In our view, the appropriate Government has to apply the cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post specific and not vacancy based.

36. In the aforesaid case dealing with the rule of carry forward the Apex Court in reference to the Constitutional amendments observed that carry forward / unfilled vacancy of a year can be kept out/excluded from the overall ceiling of 50% reservation. In paragraph-96 of the judgment the Apex Court observed thus:

96. the Constitution (Eighty- first Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in R.K. Sabharwal. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled up by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies does not arise. Therefore, in effect, Article 16 (4-B) grants legislative assent to the judgment in R.K. Sabharwal. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.

37. In State of UP vs. Pawan Kumar Tiwari reported in (2005) 2 SCC 10 observed thus:

9. There is yet another reason why the judgment of the High Court has to be maintained. The total number of vacancies was 93. Consequent upon the allocation of reservation and calculation done by the appellants, the number of reserved seats would be 47, leaving only 46 available for general category candidates. Meaning thereby, the reservation would exceed 50% which would be unconstitutional. The total number or reserved seats could not have been more than 46 out of 93.

38. In view of the clear stand of the respondents that they have applied the

percentage on reservation against the vacancies and not against the posts as a unit, the calculation made by the respondents for filling up the vacancies of the SDAO earmarking the prescribed percentage on reservation on the basis of calculation of vacancies and not the posts, is not sustainable in law.

39. Issue Nos. (d) and (e) : While it is the general rule that percentage of reservation cannot exceed 50%, but as observed in the case of M. Nagraj (supra), rule of 50% cannot be applicable in case of carry forward and unfilled vacancies . Clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty first Amendment) Act, 2000.

40. Once it is held that the cadre strength as the unit should be taken into account to determine whether the reservation upto the quota limit has been reached and that the percentage of reservation is to be fixed in respect of a particular cadre and the roster in case of reserved points and also that the cadre strength is always measured by the number of posts comprising the cadre, the rule of backlog will apply only in respect of those posts and not to any newly created posts. In the instant case, the Roster Register has been maintained from 1979 in respect of the existing posts/vacancies. There was no visualization of the 100 upgraded posts. Thus, the formula of backlog/carry forward/unfilled vacancies will have to be applied against the normal vacancies and not against the upgraded vacancies. At the same time, percentage of reservation will apply in respect of 100 upgraded vacancies as per its normal rule.

41. From the counter affidavit, it appears that the respondents have conducted the selection for promotion to the post of SDAO taking into account the normal vacancies as well as the upgraded posts. No year wise penal has been prepared. Percentage of reservation has been applied against 289 vacancies as against the total cadre strength of 62/65 which is clearly in violation of the principles laid down in the case of R.K. Sabharwal (supra). Further, as per the aforesaid Division Bench judgment of this Court, the Govt. in the particular department may also prescribed ratio of promotion from amongst the AEO and JSMS against 100 upgraded posts. In such a situation, the respondents cannot implement the selection already conducted in violation of the underlying principles. Be it stated here that the said selection was conducted prior to the earlier writ proceeding.

42. During the course of hearing, it was emphasized by the learned counsel for the parties that the incumbents belonging to both the categories, i.e. AEO and JSMS are long overdue for promotion to the post of SDAO. However, because of the ongoing litigations, such promotions could not be given to them. Keeping in view that aspect of the matter, it is hereby directed that the respondents shall conduct the selection afresh consistently with the observations made above and the entire process shall be completed on or before 30th November, 2007 including issuance of orders of promotion as per rules.

43. The writ petition is answered in the above manner and allowed to the extent indicted above, leaving the parties to bear their own costs.